In the

Supreme Court of the United States

October Term, [illegible].

The Colorado National Bank of Denver and [illegible] Hendrie [illegible], Executors of the Estate of [illegible] Hendrie, Deceased, Petitioners,

v.

Commissioner of Internal Revenue.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR PETITIONERS.

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No. 30

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I.

OPINION BELOW.

The memorandum opinion by the Board of Tax Appeals (not reported) appears at page 26 of the Record. The opinion of the Circuit Court of Appeals is reported in 95 F. (2d) 160, and is found at page 49 of the Record.

II.

JURISDICTION.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the act of Feb-

ruary 13, 1925. The decision of the Board of Tax Appeals in favor of the taxpayer was entered November 9, 1936 (R. 28). The Commissioner petitioned for review January 30, 1937 (R. 29).

The judgment of the Circuit Court of Appeals was entered on January 31, 1938 (R. 55). Petition for rehearing was filed on March 1, 1938 (R. 56) and denied on April 4, 1938 (R. 58). The petition for a writ of certiorari was filed on May 2, 1938, and was granted May 31, 1938 (R. 59).

III.

STATUTE INVOLVED.

The statute involved is set out in the Appendix (infra, p. 49).

IV.

STATEMENT OF CASE.

Five and one-half years before his death, Edwin B. Hendrie created on January 7, 1927, an irrevocable trust (Exhibit B, R. 9) of approximately $827,000.00, the income to accumulate and to be added to the principal during his life, and on his death the income to be paid his daughter with remainder over to her children. He died on July 15, 1932, at the age of eighty-five years and six months (R. 33).

Petitioners are executors of his estate and on the federal estate tax return reported a gross estate of $938,006.68 (R. 34). The trust assets were not included. The Commissioner of Internal Revenue in a deficiency notice, September 13, 1934, added the amount of $1,034,074.22, representing the value at Mr. Hendrie's death of the property transferred to the trust (R. 34) and asserted a deficiency tax in the amount of $188,108.28 (R. 34).

Petitioners appealed to the Board of Tax Appeals, December 8, 1934 (R. 2), and in a stipulation of facts filed May 19, 1936, all of the foregoing facts were stipulated. In addition verified statements of various witnesses (physi-

cian, lawyer and son-in-law) were admitted in evidence by stipulation, in lieu of depositions (R. 37, 39, 42).

The undisputed testimony of decedent's physician (R. 37), his son-in-law (R. 42) and his lawyer (R. 39) was to the effect that decedent until shortly before his death and at and long after the execution of the trust was in good health, had had no serious illness, was without symptom of disease (R. 39), was active in business (R. 42), exercised regularly, taking setting-up exercises and walks, played golf, took annual trips alone to California and at the time of the execution of the trust was contemplating speculation in the stock market and thereafter did so speculate on a considerable scale (R. 44).

The reason he gave to the trust officer for the creation of the trust was (R. 41) the thought that

> "after he made this trust agreement he would then have his more speculative securities left and would feel free for the rest of his life to speculate in whatever securities he might wish and that his purpose in making the trust agreement was to transfer the trust corpus in the manner provided for in said trust deed and thereby putting it entirely beyond his own power to otherwise dispose of the same contrary to the provisions of the said trust deed and to remove it from the vicissitudes of his speculations. Mr. Hendrie expressed doubt as to the stability of the market and expressed a desire to 'play on the market' more actively and in a more speculative way than in the past. Mr. Hendrie often spoke of his intention of thus occupying himself for the rest of his life, and in giving less time to the Hendrie and Bolthoff business."
>
> "Mr. Hendrie at all times indicated that his thought was how to word the trust agreement so that, whatever might happen to him financially in the future and in regard to his remaining fortune, the

corpus of the trust would in nowise be jeopardized thereby, or prevent the disposition of said corpus in the manner provided for in said trust deed." (R. 42)

At his death the value of the trust was greater than the value of his estate (R. 15, 17).

There was no discussion of avoidance of death or inheritance taxes or of the disposition of the balance of his estate, nor is there anywhere in the Record any evidence of a desire to avoid the estate tax or any discussion of it, nor was there any discussion of the disposition of the rest of his fortune (R. 42). His will (R. 44) had been drawn some two years before the creation of the trust. It was never changed.

V.

RULING OF BOARD OF TAX APPEALS AND OF THE CIRCUIT COURT OF APPEALS.

The Board of Tax Appeals, in a memorandum opinion entered September 19, 1936, not reported, but appearing (R. 26), found for the taxpayer (petitioners), holding the gift was not in contemplation of death. It said (R. 28):

> "* * * Their point is that he made the transfer so that he would be free to speculate on the stock market for the rest of his life without fear that loss of his fortune would leave nothing for his daughter and her children. They point out that the donor made a complete gift and retained no possession or enjoyment to himself. They cite and rely upon Shukert v. Allen, 273 U. S. 545; McCormick v. Burnet, 283 U. S. 784; St. Louis Union Trust Co. v. Becker, 76 Fed. (2d) 851, affirmed 296 U. S. 48; Reinecke v. Northern Trust Co., 278 U. S. 339 (fol. 30); Klein v. United States, 283 U. S. 231, among others. The Commissioner relies upon the fact that the income was to be accumulated and added to corpus during the life of the donor and, consequently, the beneficiaries were

to receive nothing until after the death of the decedent. He argues from this circumstance that the transfer was a substitute for testamentary disposition made in contemplation of death. We think the transfer was not made in contemplation of death within the meaning of the statute as explained in United States v. Wells, 283 U. S. 102. * * *"

The Circuit Court of Appeals (Judge Lewis dissenting) reversed the Board (R. 49), 95 F. (2d) 160. It held that:

> "* * * The trust was not designed to make provision for the beneficiaries during his life. None of the property or the increment thereto was to reach them until after his death. Neither was it designed to enable him to engage in speculation. He could have done that unfettered and unrestrained without the establishment of the trust. But in its absence the property transferred would have been subject to the hazards of speculation. It would have been within reach of creditors if he lost all. The dominant purpose was to make provision for his descendants after his death, in the event his speculations proved tragic. It was to place that substantial amount of property in an asylum of immunity from adverse consequences of speculation, in order to make certain that it would be used for his daughter and her children after his death. It was to make assurance doubly sure that provision was made for them, not during his life but after his death. Certainty that the property would be devoted to that use was the objective, and the transfer was a means to that end. His desire for that certainty was gratified by the transfer. The purpose was a commendable one, but the generating motive for a transfer made in such circumstances is associated with death. It follows that the transfer (fol. 59) was made in contemplation of death within

the meaning of the statute, though decedent was in sound health of body and mind and did not entertain thought of death immediately or in the near future. * * *

"It is settled law that a finding of fact made by the Board of Tax Appeals will not be disturbed on review if it is supported by substantial evidence. * * * We fail to find any substantial evidence that the transfer under consideration was not made in contemplation of death within the meaning of the statute." (R. 55.)

VI.

SPECIFICATION OF ERRORS RELIED ON.

The Circuit Court of Appeals erred:

(1) In reversing the decision of the Board of Tax Appeals and giving judgment for the Commissioner.

(2) In holding that decedent's irrevocable transfer effected by the declaration of trust dated January 7, 1927, was made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

(3) In holding that this irrevocable gift in trust without reservation of income to donor was in contemplation of death as a matter of law under said statute because it withheld from the beneficiaries the actual enjoyment thereof until after donor's death, thereby disclosing an intent to provide for them after his death.

(4) In holding that though the trust was for the purpose of preserving a part of donor's property from the dangers of his future stock market speculation, yet the desire to preserve it was in order to provide with it for his descendants after his death, and that it was therefore as a matter of law in contemplation of death under the said statute.

(5) In overturning the determination of the Board of Tax Appeals that the gift was not in contemplation of death and in holding that such determination was without substantial evidence to support it.

VII.

SUMMARY OF ARGUMENT.

Contemplation of death is a question of fact. Evidence on all the important points and circumstances stressed by the courts and the Regulations as important in its determination was presented to the Board of Tax Appeals. The Board found that the transfer was not made in contemplation of death. The evidence was convincing in support of that determination. The Circuit Court of Appeals was without power to determine that question of fact for itself.

Both the court and the Government in effect admit that the immediate or proximate cause of the transfer was fear of losing the property in the stock market speculation in which donor was about to plunge. They rely on the single fact that the gift provided for his beneficiaries after donor's death and was intended so to do. Intent to provide for one's beneficiaries after death is claimed to be the equivalent of contemplation of death regardless of all other circumstances and as a matter of law.

In this respect gifts in trust in which income is to accumulate for the beneficiary during the donor's life, as in this case, and those in which he reserves a life interest to himself are alike. They both evidence an intent to provide to the extent of the gift for the beneficiaries after donor's death. This court has many times repudiated the contention that such fact makes the gift taxable.

Moreover, Congress, in the Joint Resolution of March 3, 1931, and in the Revenue Act of 1932, specifically selected only one class of such gifts for taxation, namely, those

reserving a life interest to the donor, himself, clearly ex-cluding by implication those without such reservation.

It is also clear that gifts which are not intended to take effect in possession and enjoyment till after donor's death are in the same way intended to provide for the beneficiaries after donor's death. Yet, Congress in order to reach such gifts felt it necessary to enact the possession and enjoyment provision of the statute. The most ele-mentary doctrines of statutory construction indicate that "contemplation of death" did not cover such cases.

It is self-evident that life insurance is intended to provide for the beneficiary after donor's death. Yet, the Treasury has continuously recognized that life insuranc may or may not be assigned or a beneficiary named in con-templation of death, depending on health, anticipation o death and other factors wholly apart from the intent t provide for beneficiaries after donor's death.

In the long series of Treasury Regulations issued un-der the various revenue laws, it has never once been claime that the intent to provide for beneficiaries after donor' death even constituted evidence of contemplation of death much less that it was conclusive thereof.

In the face of all this judicial and administrative in-terpretation, Congress has repeatedly reenacted the con-templation of death provision without change. It ha thereby adopted such interpretation as a part of th statute.

The contemplation of death provision was aimed a those who in expectancy of death transferred their prop-erty prior thereto and thus evaded the tax. Up to Regu-lations 80 the Regulations have so defined it almost fro the start. They specifically point out that it does no refer to the expectation of death common to all, but to special expectation of death arising from a bodily or men-tal condition. This administrative definition has been ap

proved by repeated congressional enactments of the law and by this court. It is too late for the Department or the courts to make a new and different definition.

One's expectation of death is ascertained primarily by a determination of his physical condition. For that reason the evidence in contemplation of death cases has almost invariably revolved around the health of the donor, his length of life after the gift, his general outlook on life and his plans, if any, for future activity. If his expectation of death is only that common to all, his gift is not within the statute. In contemplation of death cases then, the object of the court really is to determine whether donor had some different expectation of death than that common to all and whether that expectation of death was the motive for the gift.

If intent to provide for one's children after death is conclusive of contemplation of death, as the lower court says, then it must be that such intent does not exist in men with only the ordinary expectation of death. But the desire to provide for one's children after death is obviously common to all whatever their expectation of death and whatever their health and age. By many, such provision is deemed a moral obligation.* Evidence of that fact, if any is needed, may be found in the billions of dol-

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* In *Burnet v. Wells*, 289 U. S. 670, Mr. Justice Cardozo speaking for the court said at p. 681:

> "Insurance for dependents is today in the thought of many a pressing social duty. Even if not a duty, it is a common item in the family budget, kept up very often at the cost of painful sacrifice, and abandoned only under dire compulsion. It will be a vain effort at persuasion to argue to the average man that a trust created by a father to pay premiums on life policies for the use of sons and daughters is not a benefit to the one who will have to pay the premiums if the policies are not to lapse. Only

lars of life insurance taken out by young and old alike, all presumably in good health and not with any other expectation of death than is common to all mankind and without any intent to evade the estate tax.

Moreover, anyone with even ordinary sense about to risk his fortune in the stock market will set aside a part to protect his family as did Mr. Hendrie. The gift was clearly in contemplation of the dangers of speculation and not in contemplation of death.

By defining a testamentary disposition as "one intended to provide for the objects of testator's bounty at death" (p. 7, Government's Brief opposing certiorari), the Government arrives at the conclusion that any gift which accomplishes that purpose is a substitute therefor and is therefore in contemplation of death. Such conclusion is not only barred by the long judicial and legislative interpretation hereinbefore set forth, but is clearly erroneous.

The essential characteristic of a testamentary gift which distinguishes it from an inter vivos gift is that in the former case no property right is parted with and none obtained till testator's death. Until that date the will is a nullity. By an inter vivos gift the donor parts with property rights when the gift is made.

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by closing our minds to common modes of thought, to everyday realities, shall we find it in our power to form another judgment. * * *

"* * *. The relation between the parties, the tendency of the transfer to give relief from obligations that are recognized as binding by normal men and women, will be facts to be considered. * * * A particular expense which for millions of men and women has become a fixed charge, as it doubtless was for Wells, an expense which would have to be continued if he was to preserve a contract right, was to be met in a particular way. * * *"

To say that an inter vivos gift is taxable as a substitute for a testamentary gift because of the person to whom or the manner in which it gives the property, involves a complete confusion of thought. It disregards the statute and depends upon the exaggeration of minor incidentals into essential characteristics.

VIII.

ARGUMENT.

An analysis of the lower court's opinion shows that there is no question in this case of any attempt to evade the estate tax, no claim of thought of death immediately or in the near future, no claim of disease or ill health at the time of the gift and finally neither a two year presumption nor a finding of the Board of Tax Appeals to aid the tax. On the contrary, the court concedes that the evidence shows commendable motive, good health, anticipation of future business activity, particularly in the stock market, lack of thought of death immediately or in the near future, continued life for more than five years after the gift, and the determination by the Board of Tax Appeals that the gift was not in contemplation of death.

Furthermore, it finds that the motive for the transfer in trust was the desire to preserve a part of donor's property from the dangers of his future activities in the stock market "in order to make certain that it would be used for his daughter and her children after his death." This purpose obviously could not have been achieved by a testamentary disposition. It required segregation of the property then, not at death, if he was to avoid the effects of his own future speculations.

The evidence goes to the very points that the courts and the Treasury Regulations have for years stressed as vital in these cases. The very first sentence of the Treas-

ury Regulations* for many years read as follows (Art. 16, Regulations 70, 1929 Edition):

> "The words 'in contemplation of death' do not mean, on the one hand, a general expectation of death such as all persons entertain, nor, on the other, is the meaning limited to an expectation of immediate death."

Over and over again has this thought been reiterated in the Regulations and in the cases. The Regulations continue:

> "* * * A transfer, however, is made in contemplation of death wherever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem the proper objects of their bounty. * * *"

It is the expectation of death arising out of some special bodily or mental condition that must be found to justify the tax. It is not the manner of the disposition of the property or the time of the enjoyment. They are not even mentioned in connection with contemplation of death.

That intent to provide for one's beneficiaries after death is not of importance as evidencing any expectancy of death other than is common to all, is obvious from an examination of life insurance statistics. In Dingman on Insurability a table is given at p. 113 showing the ages of people taking out life insurance designed to provide for their beneficiaries after death.

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*See Regulations 37, 1921 Edition, Art. 23; Regulations 63, 1922 Edition, Art. 16; Regulations 70, 1929 Edition, Art. 16.

It shows that 14% of the policies are taken out by those below 25 years of age and 63% of those below forty. The age grouping based on a unit of 100,000 buyers shows that within that range the policies are purchased as follows:

4,000	at age	15-20
10,000		20-25
15,000		25-30
16,000		30-35
18,000		35-40

Surely the millions of healthy people who take out such insurance cannot because of its nature and intent be said to be acting in any expectation of death other than is common to all.

Nor has the fact that a man had life insurance and was regularly paying premiums thereon, thus periodically reaffirming his intent to provide for his beneficiaries after death, ever been advanced as evidence that any particular gift he made during that time was with a special expectancy of death or in contemplation of death. Yet, if the Government's position is right, it would be potent evidence to sustain the tax on such gifts.

The Treasury Regulations continue:

"Facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health and his anticipation of death." Obviously the important questions are whether the man was in good health, whether he died soon after he made the gift, whether he continued his activities in life or simply laid down and waited to die, whether there was anything connected with his future activities that might be a reason for the transfer or whether it was just a scheme to evade the estate tax. If the nature of the gift involving postponed enjoyment till donor's death constituted any evidence at all of contemplation or expectation of death different from that of the ordinary

person, which is extremely doubtful, it certainly did not constitute conclusive evidence thereof. Take, for example, the evidence and discussion in *United States v. Wells*, 283 U. S. 102. Mr. Justice Hughes, speaking for the court, said at pp. 113, 115, 118, 119:

"'* * * The best evidence of the state of the decedent's health at the time the transfers were made is the statement of his doctor. The best evidence of the decedent's state of mind at that time and the reasons actuating him in making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all the circumstances concerning the transfers.'

"* * * It is recognized that the reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive. * * * The dominant purpose is to reach substitutes for testamentary dispositions and thus prevent evasion of the estate tax. * * * As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. * * *

" * * *Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purpose associated with life, rather than with death, may motivate the transfer.* * * *

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*Italics throughout the brief are our own.

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts inter vivos which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed. * * * There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death.

"* * * There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus to give effect to the manifest purpose of the statute.

"* * * The court did not rely merely upon the fact that at the time of the transfers decedent considered that he had recovered from his former illness and believed the assurances given him by his physician that he need have no fear of its recurrence or any 'anxiety whatever about his state of health.' The fact was manifestly important, but, in addition to that, the court held that 'the immediate and moving cause of the transfers was the carrying out of a policy, long followed by decedent in dealing with his children of making liberal gifts to them during his lifetime.' * * * In the view of the court as thus explicitly stated, not only was there no fear at the time of the transfers that death was near at hand, but the motives for the transfers brought them within the category of those which, as described by the Government, are intended by the donor 'to accomplish some purpose desirable to him if he continues to live.' * * *"

THE RULING OF THE CIRCUIT COURT OF APPEALS OVERTURNING THE BOARD OF TAX APPEALS' FACT DETERMINATION IS BEYOND ITS POWER.

The Court of Appeals, however, in effect disregards all the evidence stressed by this court and the Regulations as important, and from the single fact that the instrument provides an income for his daughter after his death and was intended so to do, infers, contrary to the finding of the Board, that contemplation of death was the moving cause of the gift. It is difficult for us to see how this inference is possible from the evidence. If it is possible, it certainly is not the only inference possible. In the face of the determination of the Board on this question of fact, the Court of Appeals has no power to choose between conflicting inferences.

In *Helvering v. Commissioner of Internal Revenue*, 296 U. S. 300, at 306 it is said:

> "* * * The same restraints upon jurisdiction were binding upon the Court of Appeals in reviewing the action of the Board, and binding with greater emphasis, for the Court was without power to choose between conflicting inferences unless only one was possible, or to try the case de novo. Helvering v. Rankin, 295 U. S. 123, 79 L. Ed. 1343, 55 S. Ct. 732. * * *"

In *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U. S. 606, March 30, 1936, the District Court, in which the suit originated, found (7 Fed. Supp. 742) that plaintiff had failed to sustain the burden of proof arising from the statutory presumption as to gifts within two years of death and that the gift therefore was taxable as in contemplation of death. The Court of Appeals (79 F. (2d) 602 reversed the case, holding that in the light of the Wells case, supra, the gift was clearly not in contemplation of death. The Supreme Court of the United States in holding the Court of Appeals without power to overturn the ruling of the lower court used this significant language at p. 608:

"* * * Where a general verdict is found by the trial court, it has the same effect as the verdict of a jury. The Appellate Court cannot pass upon the weight of evidence." (Citing many cases.)

"Here, plaintiffs' exceptions to the conclusions of law of the trial court, and to the refusal of the court to reach other conclusions as requested, raised no question save the one of law, whether the court's verdict was wholly without evidence to sustain it. That question does not appear to be sustantial. * * * *The ultimate question for the decision of the trial court was one of fact and its general verdict was conclusive.* The Circuit Court of Appeals was without authority to weigh the evidence and to make its own findings."

In *Elmhurst Cemetery Company of Joliet v. Commissioner of Internal Revenue*, 300 U. S. 37, the Supreme Court said (p. 40):

"* * * It is the function of the Board to weigh the evidence and declare the result. * * *"

In *Neal v. Commissioner of Internal Revenue*, 53 F. (2d) 806 (Circuit Court of Appeals, Eighth Circuit), the Court says (p. 807):

"Were these gifts made 'in contemplation of death,' as that expression is used, in the statute * * *?" (Citing cases.) "This is purely a question of fact. The fact sought is the controlling motive in the mind of Neal in making these gifts * * * and we cannot disturb the determination of the Board thereon if there is substantial evidence to support such determination. * * *"

In *Commissioner of Internal Revenue v. Sharp et al.*, 91 F. (2d) 804 (Circuit Court of Appeals, Third Circuit), gifts in trust were involved. The Board of Tax Appeals found (30 B. T. A. 532, at 536):